FCC 93-454

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
	)	
Regulatory Treatment of Mobile Services	)	

NOTICE OF PROPOSED RULE MAKING

Adopted: September 23, 1993; Released: October 8, 1993

Comment Date: November 8, 1993
Reply Comment Date: November 23, 1993

By the Commission:

TABLE OF CONTENTS

I. INTRODUCTION

1. Title VI, Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act")[1], signed into law August 10, 1993, amends Sections 3(n) and 332 of the Communications Act of 1934,[2] to create a comprehensive framework for the regulation of mobile radio services. As part of this undertaking, Congress has directed the Commission to commence a rule making to implement these sections as amended. In addition, the Budget Act directs the Commission to issue a rule making defining the regulatory status and treatment of Personal Communications Service (PCS) providers.

2. We are issuing the instant Notice of Proposed Rule Making (Notice) in response to Congress's mandate. Specifically, by our action today, we seek comment on proposals that would (1) address the definitional issues raised by the Budget Act; (2) identify various services, including PCS, affected by the new legislation and describe the potential regulatory treatment thereof; and (3) delineate the provisions of Title II of the Communications Act that will be applied to commercial mobile services and those provisions that, within the bounds of the discretion afforded by Congress, will be forborne.

II. BACKGROUND

A. Summary of Regulatory Treatment Provisions of the Budget Act

3. The Budget Act amends Sections 3(n) and 332 of the Communications Act (the "Act") to create a comprehensive regulatory framework for all mobile radio services, including existing common carrier mobile services, private land mobile services, and future services such as PCS. Under revised Section 332, which previously governed private land mobile service, mobile services are classified as either "commercial mobile service" or "private mobile service."[3] Commercial mobile service providers are treated as common carriers under the Communications Act, except that the Commission may exempt them from provisions of Title II other than Sections 201, 202, and 208. Private mobile services are not subject to any common carrier regulation. Section 332(c)(3) preempts state and local rate and entry regulation of both commercial and private mobile service, but allows the states to regulate other terms and conditions of commercial mobile service. In addition, states may petition for authority to regulate commercial mobile service rates under circumstances specified by statute.

---

[1] Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993).

[2] 47 U.S.C. §§ 153(n), 332.

[3] For existing private land mobile licensees who fall within the definition of commercial mobile service, the statute sets forth several transitional provisions. Specifically, private licensees providing service prior to August 10, 1993 and private paging licensees on frequencies allocated as of January 1, 1993 will continue to be treated as private mobile service providers for three years after the date of enactment. Budget Act, § 6002(c)(2)(B). Nevertheless, as discussed at paras. 76-78 below, all reclassified private licensees are immediately subject to the foreign ownership restrictions imposed on common carriers by Section 310(b) of the Communications Act, and must file a waiver petition to grandfather existing foreign ownership by February 10, 1994.

B. Regulatory Action Required For Implementation

4. The Budget Act requires the Commission to promulgate a variety of regulations to implement the "regulatory treatment" provisions contained in the legislation. First, the Commission must complete a rule making within 180 days of enactment implementing Section 332 as it affects the licensing of PCS.[4] This rule making must include a determination pursuant to Section 332(c)(1)(C) of the state of competition among commercial mobile services and the extent of Title II regulation that will be imposed on PCS providers. In addition, the Commission must issue regulations within one year of enactment generally implementing the "regulatory treatment" provisions of the Budget Act, including: (1) necessary modifications of our private land mobile rules, (2) regulations insuring that private services reclassified as commercial mobile services and substantially similar existing common carrier services will be subject to comparable technical requirements, (3) other regulations necessary to implement the amendments to Sections 332 and 3(n) of the Communications Act, and (4) provisions necessary to provide for an orderly transition.[5]

III. DISCUSSION

5. The statutory revisions to Sections 332 and 3(n) of the Communications Act require us to decide and promulgate rules on a variety of issues: (1) How should we interpret and apply the statutory definitions of "commercial mobile service" and "private mobile service"? (2) How will existing common and private carrier services be classified under these definitions? (3) How will future services such as PCS be classified? (4) What degree of Title II regulation should be imposed on commercial mobile services? (5) What transitional measures are necessary to implement these legislative changes?

6. Although the Budget Act establishes different timetables for resolving these issues as they apply to PCS and as they apply to mobile services generally, we believe that many of these issues are sufficiently interdependent that they must be addressed comprehensively. Therefore, we are combining the PCS and non-PCS portions of our proposal into a single proceeding, and we intend to solicit comments and promulgate rules on all common issues within the 180-day time frame mandated by the legislation for PCS-related decisions.[6]

---

[4] 47 U.S.C. § 332(c)(1)(D). This coincides with the Budget Act's mandate that we complete our PCS rule making within 180 days and commence licensing within 270 days of the date of enactment. See Budget Act, § 6002(d)(2).

[5] Budget Act, § 6002(d)(3).

[6] Specifically, we believe the definitional issues relating to regulatory classification should be addressed simultaneously with respect to all existing services as well as PCS. We also propose to address Title II forbearance issues on a comprehensive basis. We reserve the right, however, to defer resolution of any or all non-PCS issues until after the conclusion of the initial phase of this rule making. We anticipate that the initial report and order required to be issued in 180 days may be accompanied by a further notice on non-PCS issues not resolved at that point. As required by statute, all transition issues will be decided within one year of enactment of the legislation. See Budget Act, § 6002(d)(3).

A. Definitions

7. As revised by the Budget Act, Section 332 of the Communications Act, governs the regulation of all "mobile services" as defined in Section 3(n) of the Act. The statute divides all mobile services into two categories, "commercial mobile service" and "private mobile service," both of which are defined in Section 332(d), and confers power on the Commission to further specify these terms by regulation. We request comment on how these terms should be interpreted and, where appropriate, further specified in our regulations.

1. Mobile Service

8. The definition of "mobile service" under revised Section 3(n) is similar to the prior version of Section 3(n), i.e., "mobile service" continues to be defined as a "radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves," and includes "both one-way and two-way radio communications services." The Budget Act adds two subsections to Section 3(n) to specify additional services that are included within this general definition: (1) traditional private land mobile services, which were previously defined in Section 3(gg) of the Act (now deleted); and (2) personal communications services, whether licensed in our PCS docket or in a successor proceeding.

9. The amended Section 3(n) does not appear to substantively change the Act's prior definition of "mobile service." Instead, the amendment simply clarifies that private land mobile services and personal communications services are to be included within the general category of mobile services for purposes of regulation under Section 332. We tentatively conclude that the statutory definition is intended to bring all existing mobile services within the ambit of Section 332. We propose to include within this definition all public mobile services regulated under Part 22 of our rules, mobile satellite services regulated under Part 25, private land mobile services (Part 90), mobile marine and aviation services (Parts 80 and 87),[7] and personal radio services (Part 95).[8] In addition, we intend to treat all personal communications services licensed under our proposed Part 99 as mobile services. We request comment on this approach.

2. Commercial Mobile Service

10. Section 332(d)(1) provides that a mobile service will be classified as a "commercial mobile service" if it meets two criteria: the service (1) is "provided for profit," and (2) makes "interconnected service" available "to the public" or "to such classes of eligible users as to be effectively available to a substantial portion of the public." "Interconnected service," in turn, is defined in Section 332(d)(2) as "service that is interconnected with the public switched network" or service for which an interconnection request is pending under Section 332(c)(1)(B). The statute expressly requires the Commission to specify "effectively available

---

[7] Most marine and aviation services regulated under Parts 80 and 87 appear to meet the statutory definition of "mobile service." However, to the extent that marine and aviation licensees provide fixed point-to-point service (e.g., Operational Fixed Station licensees under Part 80, Subpart L, and Part 87, Subpart P), they would not be included within this definition.

[8] Part 95 services consist of General Mobile Radio Service, Radio Control Radio Service, Citizens Band Service, and Interactive Video and Data Service (IVDS). All of these services appear to meet the definition of mobile service except for IVDS, which is a fixed service and therefore beyond the purview of Sections 3(n) and 332.

to a substantial portion of the public" and to define "interconnected" and "public switched network." We request comment on how the various elements of "commercial mobile service" should be defined or interpreted.

a. Service provided for profit

11. The first element of the definition of "commercial mobile service" is that the service must be "for profit."[9] The legislative history does not discuss this element, but we believe this language is intended to broadly distinguish between those mobile radio licensees who seek to provide mobile radio service on a for-profit basis to customers and those licensees who do not. Thus, government and non-profit public safety services[10] would be outside the scope of the commercial mobile service definition. Similarly, businesses that operate mobile radio systems solely for their own private, internal use would not be considered to be providing mobile radio services to customers for profit.

12. We seek to adopt rules that reflect this basic distinction between for-profit and non-profit services. Thus, we seek comment on when a mobile service that is offered by a licensee to customers would be considered a for-profit service for purposes of Section 332(d). For example, we seek comment on whether the for-profit test should be based on whether the service as a whole is offered on a commercial basis, as that term is used in Part 90 of our rules. Under this approach, a commercial service provider, as that term is used in Part 90, might be classified as a "for-profit" service even if it contended that the "interconnected" portion of its service was being offered on a non-profit basis. We also seek comment on whether a licensee who operates a system for internal use but also makes excess capacity available on a for-profit basis should be deemed to be providing for-profit service to that extent.[11]

13. Finally, we request comment on how the "for-profit" test should be applied to shared systems currently operating under Part 90.[12] One approach would be to treat such systems as not-for-profit so long as service is provided on a shared-cost basis, with no licensee seeking or obtaining a profit from the service. This approach is arguably consistent with the language of revised Section 3(n), which provides that "private" communications systems may

---

[9] 47 U.S.C. § 332(d)(1).

[10] We note that some services in the Special Emergency Radio Service are offered to public safety entities by licensees on a for-profit basis. See discussion below at para. 35 n. 46.

[11] Under our current rules, private land mobile licensees may share facilities that they use internally with other users on a for-profit, private carrier basis. 47 CFR § 90.179. However, licensees may only sell capacity to users who are themselves eligible to obtain a license in the service category in question. 47 CFR § 90.179(a). See generally Report and Order, PR Docket 89-45, 6 FCC Rcd 542 (1991). See also discussion at para. 25 below.

[12] Shared systems involve either an arrangement where the licensee offers excess capacity to unlicensed eligible users or where each user of the licensed facilities is individually licensed. See generally Memorandum Opinion and Order, Docket No. 18921, 93 FCC 2d 1127 (1983). The latter type of system, commonly referred to as "multiple-licensed" systems, takes the form of either non-profit cooperatives, where system costs are equally divided among all licensed users, or so-called "community repeaters," where one of the system licensees or an unlicensed third party manages the system for the other licensed users.

be licensed on an "individual, cooperative, or multiple basis."[13] A related issue raised under this approach is whether parties to a non-profit cost-sharing arrangement could employ a for-profit entity to manage the system. Under Section 90.179 of our rules, a sharing arrangement is considered "for-profit" only where a licensee profits from the arrangement. The fees charged by a third-party manager are treated as a cost to be shared by the licensed users, and do not render the arrangement for-profit. We request comment on whether to continue using this approach in determining what services are for-profit under Section 332(d)(1). We also request comment regarding whether a for-profit system manager should be regulated as a commercial mobile service provider under this approach.

b. Interconnected service

14. The second element of the definition of "commercial mobile service" provides that "interconnected service" must be available.[14] "Interconnected service," in turn, is defined as service that is "interconnected with the public switched network" or "service for which a request for interconnection is pending . . . ."[15] Congress has required the Commission to define "interconnected" and "public switched network" through the rule making process. Accordingly, we seek comment on how interested parties would define both these terms.

15. From the legislative history, it appears that Congress intended by use of the term "interconnected service" to distinguish between those communications systems that are physically interconnected with the network and those systems that are not only interconnected but that also make interconnected service available. The Conference Report notes that under the language of the Senate version of Section 332, which was substantially adopted by the Conference Committee, "interconnected service must be broadly available," whereas the proposed House version would simply have required that only "one aspect" of the service be interconnected.[16]

16. We could interpret this to mean that in order for a particular service offering to be considered "interconnected service," interconnected service must be offered at the end user level, i.e., the service must provide subscribers to mobile radio service with the ability to directly control access to the public switched network for purposes of sending or receiving messages to or from points on the network. Thus, a service that does not allow the subscriber directly to access the network may not be "interconnected service" even though the service provider may otherwise use the facilities of the public switched network. Another explanation of the distinction between "interconnection" and "interconnected service" could be that Congress was concerned that certain "private line" type services might interconnect with and use facilities of the public switched network, but that a subscriber would be able to send or receive messages only between limited points in the network. Under this interpretation, these services would not constitute interconnected service, but a service that allows a subscriber to send or receive messages over the public switched network would constitute an interconnected service. Commenters are asked to discuss these interpretations, as well as those types of service likely to be included or excluded by them.

---

[13] 47 U.S.C. § 153(n)(2).

[14] 47 U.S.C. § 332(d)(1).

[15] 47 U.S.C. § 332(d)(2).

[16] H.R. Rep. No. 102-213, 103rd Cong., 1st Sess. (1993) ("Conference Report"), at 496.

17. We also seek comment on the degree to which prior Commission precedent concerning interconnection may be helpful in defining the term "interconnected." In light of our statutory obligation to define this term by regulation, we believe it is appropriate to examine our use of these terms in other contexts. We provide two examples of this approach and solicit comment on the efficacy of each. Commenters are also invited to suggest any new definitions that in their view are more appropriate.

18. In the context of cellular service, the Commission has defined "physical interconnection" under Part 22 of our rules:

> The term "physical interconnection" refers to the facilities' connection (by wire, microwave or other technologies) between the end office of a landline network and the mobile telephone switching office (MTSO) of a cellular network or the hardware or software, located within a carrier's central office, which is necessary to provide interconnection.[17]

Guidance on the meaning of interconnection can also be obtained from International Satellite Systems (Intelsat),[18] in which the Commission barred international communications satellites systems competing with Intelsat from interconnecting "directly or indirectly" with any public switched message network. In that decision, the Commission specifically prohibited competing satellite systems from interconnecting through a private branch exchange (PBX) or by the manual interconnection of a switchboard operator or if a data circuit "terminates in a computer that can store and process the data and subsequently retransmit it over that network."[19] Thus, in this context, the Commission found these types of links to the public switched network to constitute interconnection with the public switched message network.

19. The Commission has also decided that current Part 22 providers are co-carriers to local exchange companies because they are generally engaged in the provision of local, intrastate, exchange telephone service.[20] Therefore, we request comments on whether a carrier that interconnects with a commercial mobile service provider necessarily offers interconnected service because its messages would be transmitted between its system and the rest of the public switched network. This interpretation would be consistent with a focus on the service being offered because the mobile service would offer customers an opportunity to contact anyone in the public switched network even if the service provider did not control any switching function.

20. We have also addressed the issue of interconnection of private land mobile services under Part 90 of our rules. In the private land mobile context, our rules define interconnection as "[c]onnection . . . with the facilities of the public switched telephone network to permit the

---

[17] Need To Promote Competition for Radio Common Carriers, 2 FCC Rcd 2910, 2918 n.27 (1987) ("Interconnection Order").

[18] Report and Order, Establishment of Satellite Systems Providing International Communications, CC Docket 84-1299, 101 FCC 2d 1046 (1985), recon., Memorandum Opinion and Order, 61 Rad. Reg. 2d (P&F) 649 (1986), further recon., 1 FCC Rcd 439.

[19] Id., 101 FCC 2d at 1101.

[20] Interconnection Order, 2 FCC Rcd at 2913.

transmission of messages or signals" between points in the telephone network and private land mobile radio users.[21] Under this definition, private land mobile licensees that use public switched facilities strictly for internal control purposes, such as "dial-up" circuits for transmitter control, are not considered to be interconnected.[22] The key to this definition, as interpreted, is whether the access to the public switched telephone network (PSTN) is under the exclusive control of the licensee or whether subscribers are permitted to routinely access the PSTN. If the licensee has direct, real-time access to the PSTN, but the subscriber cannot obtain such access, the service offered to the subscriber may not be considered interconnected service.[23]

21. The approaches to interconnection described above have particularly important implications for our regulatory classification of "store-and-forward" services, such as paging services. In most paging systems, unlike two-way services, there is no "real-time" link through the telephone network between the sender and the receiver of the paging message. Instead, the sender typically provides the message to the paging operator by using a conventional telephone line, after which the operator "stores and forwards" the information, either manually or by computer, for subsequent radio transmission at a time within the licensee's sole control. Under the Intelsat rationale described above, store-and-forward could be considered a form of interconnected service because the customer can receive a message from any subscriber to the public switched network.[24] On the other hand, the Private Radio Bureau has applied a policy to private carrier paging that distinguishes store-and-forward service from interconnected service, although this policy has not been explicitly addressed by the Commission.[25] Under this

---

[21] 47 CFR § 90.7.

[22] Id.

[23] See In re Data Com, 104 FCC 2d 1311, 1312-15 (1986). In Data Com, we found that no interconnection was involved in a communications system where callers wishing to page subscribers placed a call through the PSTN to an answering service which then relayed the message to the intended recipient by activating the Data Com transmitter through a private radio frequency link. We held that because there was no direct connection between the Data Com transmitter and the PSTN, the caller could never activate the transmitter from a position in the PSTN, and Data Com system was therefore not providing interconnected service.

[24] See para. 18 above.

[25] Other than in Data Com, where we held that relaying of paging messages by an answering service was not interconnection, our prior cases involving private paging service have turned on whether the licensee was operating a shared-use system that would subject it to the interconnection prohibition contained in the prior version of Section 332. See, e.g., In re Applications of Millicom Corporate Digital Comunications, Inc., 65 RR 2d 235, 237-239 (1983), aff'd sub nom. Telocator Network of America v. FCC, 761 F.2d 763 (1985) (because private carrier paging system is not shared by authorized users, interconnection restriction does not apply). In many instances, however, a PSTN-based caller seeking to send a paging message through a licensee-operated store-and-forward computer relay (as was the case in Millicom) arguably has no more control over the transmission of the message than a caller seeking to send a message through a licensee-operated answering service (as was the case in Data Com). Thus, the Private Radio Bureau's view has been that the two fact situations are indistinguishable as far as interconnection is concerned. On the other hand, we have also authorized private paging licensees to provide "direct access" paging service, which enables a PSTN-based caller to activate the paging transmitter directly from a touch-tone telephone, and therefore could

interpretation, the use of the telephone network by a person who does not control the transmission of the radio message is analogous to an ordinary business call to the licensee, where the telephone link ceases before the message is sent to the subscriber. We request comment on which of these approaches to store-and-forward should be applied under the statute, or whether there are other alternatives that we should consider.

c. Public switched network

22. We seek comment on how we should define "public switched network." In general, we have used the similar term "public switched telephone network" or "PSTN" to refer to the local and interexchange common carrier switched network, whether by wire or radio.[26] Although the final statute uses the term "public switched network," we note that the House version of the legislation used the term "public switched telephone network," and that the Conference Report does not note any material difference between the two terms. We seek comment on whether our traditional interpretation of the term "public switched telephone network" should be applied to the statute. Alternatively, we seek comment on whether Congress intended this element of the statutory test to encompass more than the traditional network provided by local exchange and interexchange carriers.[27]

d. Service available to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public

23. The statutory definition of "commercial mobile service" requires that interconnected service be made available "to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public."[28] This criterion would appear to be met by any interconnected service that is offered to the public without restriction, as existing common carrier services are offered. In addition, however, the reference to "classes of eligible users," as well as other provisions of the statute and legislative history, make clear that Congress intended to include some existing private services within the scope of its definition even if they are not offered to the general public without restriction.

24. We request comment on the revised standard, and particularly on what types of services should be deemed "effectively available to a substantial portion of the public" even though they are not offered to the general public without restriction, i.e., they include some

---

arguably be distinguished from Data Com. See, e.g., Report and Order, PR Docket 86-335, 2 FCC Rcd 2379 (1987). We therefore seek comment on whether our view of what constitutes interconnected service should be affected by the particular store-and-forward technology used by the service provider.

[26] For example, in discussing former Section 332(c)(1) of the Act, we have used the term "public switched telephone network" interchangeably with the phrase "telephone exchange or interconnection facility" used in the prior statute. See, e.g., Memorandum Opinion and Order, Docket No. 20846, 53 RR 2d 1469, 1470-1473 (1983). The term encompasses both wireline and wireless facilities of exchange and interexchange carriers. See, e.g., Report and Order, Basic Exchange Telecommunications Radio Service, 3 FCC Rcd 214, 217 (1988) (BETRS will provide wireless extension of intrastate basic exchange service in remote areas).

[27] See discussion at para. 19 above.

[28] 47 U.S.C. § 332(d)(1).

eligibility restrictions. One approach is to treat services as "effectively available" regardless of eligibility limitations so long as such services are available to a large sector of the public. For example, our Specialized Mobile Radio and private carrier paging eligibility rules, which define all persons and entities except foreign governments and their representatives as eligible users,[29] appear to impose virtually no practical limit on the public availability of the service.

25. On the other hand, many private land mobile services targeted to specific businesses, industries, or user groups (e.g., utilities, railroads, taxi companies) are arguably not intended for use by the public or even a "substantial portion" of the public. In the proposed House version of Section 332(d), "commercial mobile service" was defined in relevant part as service available to "broad classes of eligible users." The Conference Report notes that the word "broad" was deleted from this definition to ensure that "commercial mobile service" would encompass services offered to "broad or narrow classes of users so as to be effectively available to a substantial portion of the public."[30] This does not necessarily mean, however, that all services offered to "narrow" classes of users would be considered to meet this test. Instead, Congress arguably could have removed the reference to "broad" classes so that the sole issue in the case of all limited-eligibility services would be whether service is effectively available to a "substantial portion of the public." We seek comment, therefore, on whether we should draw a distinction between limited-eligibility services that are, as a practical matter, available to a substantial portion of the public and such services that are offered to small or specialized user groups.[31]

26. We also seek comment on whether system capacity should be a factor in determining whether a service is "effectively available to a substantial portion of the public. For example, while our SMR rules impose minimal limits on user eligibility, a traditional SMR system typically has a capacity of no more than 70 to 100 users per channel.. If we were to determine public availability based on user eligibility alone, such limitations on system capacity would be immaterial. As a practical matter, however, the limit on the number of possible users requires many of these systems to offer highly specialized services tailored to the particular needs of small groups of subscribers. Historically, these systems have operated as private services because our private radio rules afford the flexibility needed to provide such service.[32] If we deem these services to be "effectively available" to the public, and therefore commercial mobile services, the issue arises whether this flexibility can be maintained. At the same time, if we consider low-capacity private systems not to be "effectively available," this could possibly require similar treatment of small common carrier mobile radio systems that also have very limited capacity. We note that while low capacity may constitute a significant limit

---

[29] See 47 CFR §§ 90.115, 90.603.

[30] Conference Report at 496 (emphasis added).

[31] This does not necessarily mean a service provider could avoid offering "public" service merely by offering "customized" service. We seek comment on whether, if service is offered to the public or a substantial portion of the public, it would be "public" service within the meaning of Section 332(d)(1) regardless of whether it is offered indiscriminately or through individualized negotiation.

[32] For the most part, these traditional SMRs developed as an alternative for customers who would otherwise have to construct their own internal private systems to meet their mobile radio needs. See generally, Second Report and Order, Docket 18262, 46 FCC 2d 752 (1974) (subsequent history omitted).

on the public availability of private mobile services, it has not been a factor in deciding the regulatory treatment of common carrier mobile services.[33] We seek comment on these alternatives.

27. Similarly, we request comment on the possible impact of service area size and location on the public availability of mobile service. Although this issue is unlikely to affect the vast majority of mobile services, which are offered throughout standard local or regional service areas such as MSAs, RSAs, BTAs, or MTAs. it is also possible that mobile service providers could seek to serve customers in much smaller areas, such as individual office buildings or shopping centers. If such services emerge, one approach would be to treat them as effectively available to the public without regard to service area so long as they are generally available. Every service area has some geographic boundary, but if that area is open to the public and anyone can get service, there is no limitation on eligible users.[34] Alternatively, we could determine that highly localized service is not "public" service if it will be limited to a small number of users at any one time or if public access to the area is restricted. We seek comment on these alternatives.

3. Private Mobile Service

28. Section 332(d)(3) defines "private mobile service" as any mobile service that is not a commercial mobile service (as defined by Section 332(d)(1)) or the "functional equivalent of a commercial mobile service."[35] The reference to "functional equivalence" was added to the legislation in conference, although it had not been included in either the House or Senate proposed version of Section 332(d)(3). The Conference Report states that the language was amended to make clear that the term "private mobile service" "includes neither a commercial mobile service nor the functional equivalent of a commercial mobile service, as specified by regulation by the Commission."[36] As an example, the Report states that the Commission could determine that an interconnected service offered to the public is not "functionally equivalent" if it does not employ frequency reuse (or similar means of augmenting channel capacity) and does not provide service throughout a standard metropolitan statistical area or "similar wide geographic area."[37]

29. We request comment on how mobile services should be classified under this definition of "private mobile service." Based on the statutory language and the legislative history, we believe that more than one approach is possible. Under one interpretation, a mobile service would be classified as private if (1) it fails to meet the statutory definition of a commercial mobile service, or (2) it is not the functional equivalent of a commercial mobile service. Thus, a service that fell within the literal definition of a commercial mobile service

---

[33] Our common carrier rules contain no minimum requirements for system capacity. However, a small system must make its capacity available in a manner that does not unreasonably discriminate.

[34] For example, a paging service made available only in a shopping center could arguably be available "to the public" within the shopping center.

[35] 47 U.S.C. § 332(d)(3).

[36] Conference Report at 496.

[37] Id.

could nonetheless be classified as private if we determined that it was not functionally equivalent. The practical effect of this interpretation would be to expand, to a limited degree, the potential number of mobile services that would be classified as private as opposed to commercial mobile services.

30. This approach is arguably supported by the language and legislative history of Section 332(d)(3). In their respective proposed versions of this section, the House and Senate agreed that "commercial mobile service" should be specifically defined and that any mobile service failing to meet this definition would be classified as private.[38] In amending Section 332(d)(3) to include the "functional equivalence" test, the Conference Committee arguably did not change this basic statutory structure or modify the definition of commercial mobile service in Section 332(d)(1). Instead, the committee could be viewed as having added a separate basis for classifying services as private, and included in the Conference Report a specific example of a service meeting the literal definition of a commercial mobile service that nevertheless might not be functionally equivalent. This could be interpreted to support a broader, more flexible definition of "private mobile service." We request comment on this interpretation.

31. Another reading of the legislation arguably supported by the language and legislative history would provide that private mobile service does not include any mobile service that (1) fits the definition of a commercial mobile service, or (2) is the functional equivalent of a commercial mobile service. Under this alternative interpretation, a mobile service that did not squarely meet the statutory test for a commercial mobile service could still be classified as a commercial mobile service if we determined that it was a "functional equivalent." The Conference Report arguably supports this interpretation, as it states that the Conference Committee amended the definition of private mobile service to "make clear that the term includes neither a commercial mobile service nor the functional equivalent of a commercial mobile service, as specified by regulation by the Commission."[39] This interpretation also arguably comports with the view that functionally similar services should be subject to the same regulatory requirements. We seek comment on this alternative interpretation.

32. We also request comment on what specific standards we should use to determine whether a given mobile service is the functional equivalent of a commercial mobile service. Congress left to the Commission the specification of the functional equivalent of a commercial mobile service. The Conference Report, however, provides an example of a situation where the Commission can decide a service is not the functional equivalent of a commercial mobile service. The Conference Report states:

> The Commission may determine, for instance, that a mobile service offered to the public and interconnected with the public switched network is not the functional equivalent of a commercial mobile service if it is provided over a system that, either individually or as part of a network of systems or licensees, does not employ frequency or channel reuse or its equivalent (or any other techniques for augmenting the number of channels of

---

[38] Id. at 495-496. The Conference Report notes that the proposed House version of Section 332 defined private mobile service as "anything that does not fall under commercial mobile service," and that the proposed Senate definition was "virtually identical."

[39] Id. at 496 (emphasis added).

> communication made available for such mobile service) and does not make service available throughout a standard metropolitan statistical area or other similar wide geographic area.[40]

This example appears to emphasize the functioning of the mobile service. Thus, whether a service would be considered the functional equivalent of a commercial mobile service could turn on whether it employs frequency or channel reuse and makes service available throughout a standard metropolitan statistical area or other wide geographic area. We seek comment on this interpretation.

33. The Commission has previously used a functional equivalency test to determine whether a common carrier unreasonably discriminated in its charges for like communication services.[41] In that context, the test for likeness focuses on whether services are different in any material functional respect.[42] The test requires the Commission to examine both the nature of the services and customer perception of the functional equivalency of those services.[43] Customer perception is the linchpin of this test.[44] We request comment on whether the Commission's existing functional equivalency test would be appropriate for determining whether a mobile service is the functional equivalent of a commercial mobile service. We also solicit alternative proposals for defining the functional equivalent of a commercial mobile service. Finally, we seek comment on whether, instead of adopting general rules regarding the test to be used in this context, we should leave the issue of functional equivalence to case-by-case (or perhaps service-by service) definition.

B. Regulatory Classification of Existing Services

34. The Budget Act requires us to examine the regulatory status of all existing mobile services under the statutory definitions discussed above. We therefore seek comment on which existing mobile services will become commercial mobile services and which will become private mobile services under Section 332(d). In particular, we seek comment on the degree to which the new definitions require existing private services to be reclassified as commercial mobile services and on whether existing common carriers may be reclassified as private.

---

[40] Id.

[41] See AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568, Memorandum Opinion and Order on Remand, 6 FCC Rcd 7039 (1991), affirmed, Competitive Telecommunications Assoc. v. FCC, slip op., No. 92-1013 (D.C. Cir. Aug. 6, 1993); Ad Hoc Telecommunications Users Comm. v. FCC, 680 F.2d 790 (D.C. Cir. 1982); American Broadcasting Cos. v. FCC, 663 F.2d 133 (D.C. Cir. 1980); Western Union International, Inc. v. FCC, 568 F.2d 1012 (2d Cir. 1977), cert. denied, 436 U.S. 944 (1978); American Trucking Assoc. v. FCC, 377 F.2d 121 (D.C. Cir. 1966), cert. denied, 386 U.S. 943 (1967).

[42] Ad Hoc Telecommunications Users Comm., 680 F.2d at 795.

[43] Competitive Telecommunications Assoc., slip op. at 5.

[44] Ad Hoc Telecommunications Users Comm., 680 F.2d at 796.

1. Existing Private Services

35. In accordance with the exclusion of not-for-profit services from the statutory definition of commercial mobile service, we propose to classify all existing private non-commercial services as private mobile services under Section 332(d)(3). Our Rules have defined a non-commercial land mobile system as one "that will be used only for a licensee's internal use."[45] This includes government, public safety,[46] and non-commercial land mobile services under Part 90, private mobile marine and aviation services under Parts 80 and 87,[47] and personal mobile radio services under Part 95.

36. With respect to existing for-profit services regulated under Part 90, classification will depend on whether such services are providing "interconnected service" to the public or a "substantial portion of the public," as defined above. We seek comment on how this test will affect the classification of our existing SMR services. In general, we believe that wide-area SMR service should be considered available to a "substantial portion of the public" and therefore classified as commercial mobile service unless the particular service is otherwise excludable from the commercial mobile service definition. On the other hand, we request comment on whether we should classify as private mobile services those SMRs that do not offer wide-area service or do not employ frequency reuse to increase their capacity (e.g., most traditional dispatch systems), on the grounds that such services are not available to a "substantial portion of the public" or that, under one possible interpretation of the statute discussed above, they are not the "functional equivalent" of commercial mobile service.

37. If we treat wide-area SMRs as available to a substantial portion of the public, both existing wide-area SMRs and pending proposals for expanded wide-area SMR service could be affected. For example, at 220 MHz, we are currently licensing both commercial nationwide systems, many of which are likely to provide for-profit interconnected service, and non-commercial systems, to be used for the primary purpose of meeting licensees' internal communications needs.[48] We seek comment on whether for-profit interconnected services provided by 220 MHz licensees should be classified as commercial mobile service and non-commercial services classified as private. We also have pending two proceedings that would enable applicants for SMR frequencies at 800 and 900 MHz to obtain a single license to

---

[45] 47 C.F.R. § 90.717.

[46] As discussed in note 10 above, some Special Emergency Radio Services are offered to public safety entities by licensees on a for-profit basis. We seek comment on whether these services, like non-profit public safety services, should generally be classified as private mobile services on the grounds that they do not make service available to the public or a substantial portion of the public.

[47] Public coast station licensees, who are regulated under Part 80, Subpart J, as common carriers, would be classified as commercial mobile service providers.

[48] See Memorandum Opinion and Order, PR Docket No. 89-552, 7 FCC Rcd 4484 (1992), recon. denied, 8 FCC Rcd 4161 (1993). In addition, some local 220 MHz licensees may combine frequencies to offer commercial interconnected service on a regional basis.

provide wide-area service.[49] If we determine that issuing wide-area licenses is in the public interest, we expect most such licensees to provide interconnected service over large areas to a large segment of the public. We seek comment on whether such services should be classified as commercial mobile service.

38. There may be instances, however, where wide area licensees provide non-interconnected service or do not serve a substantial portion of the public. For example, a service provider could offer a wireless service that is entirely separate from the public switched network.[50] We seek comment on whether such a service should be classified as private or whether, under an alternative interpretation of the statute discussed above, it could be considered a functional equivalent of commercial mobile service even though no interconnection is involved.[51] Other wide-area service providers may devote the majority of their system capacity to traditional dispatch service or service to specialized user groups such as railroads, utilities, or the trucking industry.[52] We seek comment on whether such services should be classified as private mobile service.

39. We also request comment on the regulatory treatment of private carrier paging (PCP) services under the new statute. In our view, these services are generally provided for profit and without significant restrictions on eligibility, service area, or capacity. Whether PCPs should be classified as commercial mobile services therefore will depend on whether they are providing interconnected service, or, under one interpretation discussed above, whether they are the "functional equivalent" of a commercial mobile service.[53] If we conclude that "store-and-forward" systems do not meet either of these criteria, we expect to classify most PCP systems as private mobile service. If we conclude that store-and-forward constitutes a form of interconnected service or that it should be deemed a functional equivalent, most PCP

---

[49] See First Report and Order and Further Notice of Proposed Rule Making, PR Docket 89-553, 8 FCC Rcd 1469 (1993) (proposal to assign 200 channels in a mixture of nationwide, regional, and local licenses); Notice of Proposed Rule Making, PR Docket 93-144, 8 FCC Rcd 3950 (1993) (proposal to create Expanded Mobile Service Provider category on 800 MHz SMR channels for provision of service to BTAs or MTAs).

[50] RAM Mobile Data, for example, is currently offering a wide-area data service at 900 MHz that is not physically interconnected with the public switched telephone network.

[51] Another pending proposal would permit licensees of Automatic Vehicle Monitoring (AVM) systems to provide location services to Part 90 eligibles, individuals, and the Federal government on a for-profit basis. See Notice of Proposed Rule Making, PR Docket 93-61, 8 FCC Rcd 2502 (1993). AVM systems locate and monitor the status of mobile units by means of radio transmission to and from central control points. Assuming we allow for-profit AVM systems, we request comment on how such systems should be classified based on the factors discussed in this Notice.

[52] Part 90 of our rules currently includes examples of services dedicated to defined user groups, including utilities, oil companies, manufacturers, railroads, and taxicab companies. See generally Part 90, Subpart D (Industrial Radio Services) and Subpart E (Land Transportation Radio Services). Commenters are encouraged to address the regulatory classification of these categories on a service-by-service basis.

[53] This same analysis must be applied to common carrier paging systems as well. See para. 41 below.

systems would be classified as commercial mobile services.[54] We request comment on these alternatives.

40. Assuming that some existing private land mobile services are reclassified as commercial mobile services and others are not, we must address how commercial and private mobile services would co-exist on common frequencies.[55] While we have traditionally assigned private and common carrier services to separate frequency bands, we believe that attempting to separate our existing private land mobile bands into separate allocations for commercial and private services would be impractical and unnecessary. Instead, we prefer to afford licensees on existing private land mobile frequencies the flexibility to provide either commercial or private service as defined by our rules.[56] One alternative would be to classify these licensees as either commercial or private mobile service providers based on their primary use of the spectrum. Another alternative would be to give licensees the option to provide both commercial and private service under a single license, imposing the appropriate classification and regulation on each type of service provided. We seek comment on the implications of each of these alternatives, and on any other possible approaches to this issue.

2. Existing Common Carrier Services

a. Terrestrial services

41. We also request comment on how existing common carrier services should be classified under revised Section 332. In our view, existing common carrier mobile services that provide interconnected radiotelephone service to the public (e.g., cellular) will generally be classified as commercial mobile services. Depending upon how we resolve certain definitional issues, however, it is possible that some common carrier mobile services could be reclassified as private mobile services. We note that Congress did not enact any statutory provisions specifically addressing the reclassification of existing common carriers as private mobile services, in contrast to its detailed attention to the issue of private services being reclassified as commercial mobile services. Nonetheless, the statute appears to leave this possibility open if we conclude that an existing common carrier mobile service does not meet the definition of a commercial mobile service. For example, if we conclude that store-and-forward paging does not constitute interconnected service, as discussed above, common carrier paging systems that use store-and-forward could be subject to reclassification. We request comment on this alternative. In addition, we request comment on whether some of the smaller common carrier systems in the Public Mobile Services could be reclassified as private if we conclude that low-

---

[54] In this context, it appears that Congress contemplated that some private paging services would become commercial mobile services. Section 6002(c)(2)(B) of the Budget Act specifically grandfathers existing private paging services as private mobile services for three years after enactment.

[55] For example, our General Category channels in the 800 MHz band are available for use by multiple categories of private land mobile licensees, including private, non-commercial systems as well as SMRs and other private carriers. Thus, reclassification could cause some services offered on General Category channels to become commercial mobile services while other services on the same frequencies would remain private.

[56] This would not apply to licensees on bands set aside for exclusive non-commercial use (e.g., public safety channels).

capacity systems do not serve the public or a substantial portion of the public.[57]

42. We also request comment on whether we should amend our rules to allow existing common carriers who are classified as commercial mobile services to provide dispatch service in the future. While dispatch has been predominantly a private land mobile service over the past decade, Congress has given the Commission discretion to terminate the dispatch prohibition in whole or in part.[58] We seek comment on whether such an action would serve the public interest. First, is there any technical justification for continuing the prohibition on dispatch? Second, would eliminating the dispatch prohibition provide common carriers with greater flexibility to meet their customers' needs? Third, would eliminating the prohibition promote increased competition in the dispatch service marketplace and lower costs to subscribers?

b. Satellite services

43. Mobile services using the system capacity of a satellite licensee fall within Section 3(n) of the Communications Act. Under existing policy, the Commission may authorize a domestic satellite licensee to offer system capacity for the provision of mobile service on a non-common carriage basis. However, the Commission will refuse to allow a satellite licensee to offer system capacity on a private carriage basis if there is a showing that such regulatory treatment will run counter to the public interest.[59] Under Section 332(c)(5), Congress did not prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.[60] We tentatively conclude that we should continue our existing procedures for making this determination.[61] If the satellite system licensee opts to provide commercial

---

[57] See discussion at para. 26 above.

[58] See 47 U.S.C. § 332(c)(2). Our rules define dispatch communication as "[t]wo-way voice communication, normally of not more than one minute's duration, that is transmitted between a dispatcher and one or more land mobile stations, directly through a base station, without passing through the mobile telephone switching facilities." 47 CFR § 22.2.

[59] See Martin Marietta Communications Systems, Inc., 60 RR 2d 779 (1986) (domestic satellite licensees may be authorized to offer transponders on a non-common carriage basis absent a showing that it would not be in the public interest).

[60] See 47 U.S.C. § 332(c)(5). In addition, Section 332(c) does not alter or affect the regulatory treatment of Comsat required by title IV of the Communications Satellite Act of 1962. 47 U.S.C. § 332(c)(4).

[61] In making this determination, the Commission looks to an array of public interest considerations. See, e.g., Second Report and Order, Gen. Docket No. 84-1234, 2 FCC Rcd 485, 490 (1987) (because only a single mobile satellite service license would be granted, space segment operator was placed under an obligation to provide service on a non-discriminatory, common carriage basis). See also Second Report and Order, Gen. Docket No. 84-689, 104 FCC 2d 6650, 665-666 (1986) (radiolocation is not inherently common carrier in nature under the NARUC I test [National Association of Regulatory Commissioners v. FCC, 525 F.2d 830 (D.C. Cir.), cert. denied, 425 U.S, 999 (1976)]; common carrier obligations would impede the ability of mobile satellite service operators to tailor services to meet their customers' needs).

mobile service directly to end users, however, it shall be treated as a common carrier.[62] Similarly, provision of commercial mobile service to end users by earth station licensees or providers who resell space segment capacity would be treated as common carrier service. We seek comment on this analysis.

C. Regulatory Classification of Personal Communications Services

44. In order to begin licensing of personal communications services within the statutory deadline of 270 days, the Budget Act requires us to resolve all issues relating to the regulatory status of PCS within 180 days of enactment (i.e., by February 6, 1994).[63] Although we originally sought comment on these issues in GEN Docket 90-314 prior to enactment of the Budget Act,[64] we believe additional comment is called for in light of the revisions to Section 332.[65] We therefore seek comment on how the new regulatory framework under Section 332 should affect the regulatory classification of PCS. Specifically, we request comment on whether PCS should be uniformly treated as a commercial mobile service, as defined by Section 332, or whether there are also potential applications of PCS that would constitute private mobile service under the statutory definition. We urge commenters to address these issues with specific reference to both narrowband and broadband PCS.

45. We tentatively conclude that no single regulatory classification should be applied to all PCS services. As a practical matter, we expect that most broadband and many narrowband PCS services will involve interconnected service to the public or large segments of the public. We believe that a primary objective of Congress in revising Section 332 was to ensure that such services would be regulated as commercial mobile services. At the same time, we do not believe Section 332 requires the Commission to limit PCS to commercial mobile service applications. We have envisioned PCS as potentially providing a diverse array of mobile services, which could include applications that are not interconnected to the public switched network or are not offered to a substantial portion of the public.[66] If PCS were defined exclusively as a commercial mobile service, we are concerned that this potential diversity of applications would be unnecessarily restricted. We request comment on this view.

---

[62] Conference Report at 494. Similarly, the Commission will not exempt resellers of mobile-satellite service space segment capacity from the Act's common carriage requirement.

[63] 47 U.S.C. § 332(c)(1)(D).

[64] See Notice of Proposed Rule Making, GEN Docket 90-314, 7 FCC Rcd 5676, 5712-14 (1992) ("PCS Notice").

[65] In our First Report and Order addressing the narrowband PCS allocation, we deferred resolution of all issues related to regulatory status pending final disposition of the Budget Act by Congress. First Report and Order, GEN Docket No. 90-314, 58 Fed. Reg. 42681 (August 11, 1993). We are similarly deferring such matters in our Second Report and Order on the 2 GHz PCS allocation, adopted contemporaneously with this Notice. Second Report and Order, GEN Docket No. 90-314, FCC 93-451 (adopted September 23, 1993).

[66] At the same time, we have adopted basic coverage requirements for both narrowband and broadband PCS that will require licensees to provide some form of broadly available service in their license areas. We seek comment on the effect of such requirements on the regulatory classification of PCS.

46. If we determine that PCS should be defined to include both commercial mobile and private mobile applications, we propose to allow all PCS licensees to choose whether to provide commercial mobile or private mobile service, as defined in Section 332, regardless of frequency assignment. This would allow licensees to choose the type of services they will provide based on market demand rather than based on regulatory preconditions.[67] We also note that the concept of licensee choice was supported by many commenters in Docket 90-314 prior to passage of the Budget Act. Although the statutory test on which a PCS licensee's choice would be based is now different, we believe choice remains a valid alternative under the new law.[68]

47. We request specific comment on how the self-designation options of PCS licensees should be structured. One alternative is for PCS licensees to provide one category of service or the other on a primary basis. Thus, each licensee would choose whether to be primarily a commercial mobile service provider or a private mobile service provider, and would be allowed to provide the other type of service only on a secondary basis, if at all. A more flexible alternative would be to allow PCS licensees to provide both commercial and private mobile services on a co-primary basis under a single license. For example, a licensee with a 20 MHz channel block could choose to devote 15 MHz to a wide-area interconnected service and 5 MHz to a high-speed data service for specialized customers, each of which would be classified separately. We request comment on whether these alternatives are sufficient to ensure that PCS services will be broadly available to the public, or whether additional conditions should be placed on licensee choice to prevent inefficient spectrum use. For example, should we mandate a "threshold" level of commercial mobile service to be provided by broadband and/or narrowband PCS licensees, but otherwise allow licensees to choose the type of service they will provide?

48. We believe the statute affords us the discretion to adopt the more flexible approach discussed above. Nevertheless, such an approach raises a variety of practical issues. How should we process applications by prospective licensees who propose to provide both commercial mobile and private mobile service, particularly in light of the different filing

---

[67] We have allowed licensees to select their regulatory status in other services. Report and Order, Multipoint Distribution Service, CC Docket No. 86-179, 2 FCC Rcd 4251 (1987) at paras. 7-16 (MDS licensees may elect common carrier or non-common carrier status for each channel); Memorandum Opinion, Order and Authorization, Domestic Satellite Transponder Sales, CC Docket No. 82-45, 90 FCC 2d 1238 (1982) at paras. 41, 45 (domestic satellite licensees may offer common carrier service or sell transponders on non-common carrier basis), aff'd, Wold Communications v. FCC, 735 F.2d 1465 (D.C. Cir. 1985). Self-selection by PCS licensees would differ from self-selection in the MDS and satellite transponder contexts, however, in that the determination of regulatory status would be governed by Section 332 rather than the traditional common law test of common vs. private carriage enunciated in National Association of Regulatory Commissioners v. FCC, 525 F.2d 630 (D.C. Cir. 1976), cert. denied, 425 U.S. 992 (1976).

[68] Moreover, some of the arguments against choice made in that proceeding may carry less weight in light of the new statutory test of regulatory status. Under the previous version of Section 332, some commenters were concerned that PCS licensees could "choose" to be private carriers while essentially providing cellular-type service. The new statute makes clear that such services will be classified as commercial mobile services.

procedures and fees for common and private carrier services?[69] Should we allow licensees to change the nature of the services they provide, and therefore their regulatory status, during the term of the license? How do we verify that licensees are complying with the requirements of Section 332?[70] We request comment on these issues, and particularly on the practical implications of establishing a flexible regulatory framework for PCS licensees.

D. Application of Title II to Commercial Mobile Services

1. Statutory Provisions

49. Section 332(c)(1)(A) requires that any person providing commercial mobile service be treated as a common carrier subject to the requirements of Title II of the Communications Act. Sections 332(c)(1)(A) and 332(c)(1)(C) authorize the Commission to promulgate regulations exempting some or all commercial mobile services from regulation under any provision of Title II other than Sections 201, 202, and 208.

2. Background

50. The Communications Act, as it was adopted in 1934, applied traditional American public utility regulation to communications common carriers. Under Title II, these carriers must offer service generally and upon reasonable request (Section 201(a)), apply only reasonable rates and charges (Section 201(b)),and make no unreasonable discrimination in service (Section 202). Carriers are required to file tariffs listing their rates and regulations (Section 203) and may be subject to requirements that they obtain authorization for extensions of lines or termination of service (Section 214), file annual reports (Section 219), and conform to Commission prescribed accounting and depreciation requirements (Section 220).

51. When these obligations were first imposed there were only monopoly providers of domestic telecommunications service. Within the last few decades, however, the telecommunications industry has experienced radical changes in the technology used, the services available, and the marketplace for these services. Responding to these changes, the FCC has increasingly adopted policies reflecting a view that open entry and competition often bring greater benefits to customers and society than traditional regulation of a market limited to one or few carriers. This has proven particularly true in the case of interexchange services. In its Competitive Carrier docket, the Commission classified the traditional carriers, such as the local exchange carriers and AT&T, as dominant carriers subject to full Title II regulation; new entrants were classified as nondominant. Because these emerging carriers lacked market power to control prices or to discriminate unreasonably, the Commission adopted for them a policy

---

[69] In our companion rule making initiated today on competitive bidding procedures, we have proposed that PCS applicants seeking to provide commercial mobile service would file an FCC Form 401, applicants seeking to provide private mobile service would file Form 574, and applicants seeking to provide both types of service would file both forms. See Notice of Proposed Rule Making, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, FCC 93-455 (adopted September 23, 1993).

[70] In general, we anticipate that licensees who provide private mobile service would be required to demonstrate at the licensing stage that their service complies with the statutory definition. In all cases, the Commission would retain authority to review and make the ultimate determination as to the licensee's regulatory status.

of regulatory forbearance.[71] These carriers were not required to file tariffs under Section 203 of the Act and were not subject to certain Commission regulations adopted pursuant to the authority of other Title II provisions. Nondominant carriers did, however, remain subject to the general common carrier obligations of Sections 201 and 202 of the Act, and to the enforcement of these obligations by complaint under Section 208.

52. Last year, however, the U.S. Court of Appeals for the D.C. Circuit found the Commission's forbearance policy of permissive detariffing to be inconsistent with Section 203 of the Act.[72] Congress subsequently revised Section 332 of the Act both to require that all providers of commercial mobile services be treated as common carriers and to give the Commission specific authority to forbear from applying the provisions of Title II to such carriers, except for Sections 201, 202, and 208. Revised Section 332 sets out three specific conditions the Commission must meet in order to forbear from applying Title II to commercial mobile services or providers. In this Notice, we state our views and tentative conclusions on Title II forbearance for these carriers and request comment on these conclusions.

1. Discussion

a. Disparate treatment of commercial mobile services and providers

53. Section 332(c)(1)(A) states that a commercial mobile service provider shall "be treated as a common carrier for purposes of this Act, except for such provisions of title II as the Commission may specify by regulation as inapplicable to that service or person." [emphasis added]. According to the Conference Report, "[d]ifferential regulation of providers of commercial mobile services is permissible but is not required in order to fulfill the intent of this section."[73] Additionally, the Conference Report explains that "the purpose of this provision is to recognize that market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services. While this provision does not alter the treatment of all commercial mobile services as common carriers, this provision permits the Commission some degree of flexibility to determine which specific regulations should be

---

[71] Notice of Inquiry and Proposed Rulemaking, Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, 77 FCC 2d 308 (1979) (Competitive Carrier Notice); First Report and Order, 85 FCC 2d 1 (1980) (First Report); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, FCC No. 82-187, 47 Fed Reg. 17,308 (1982); Second Report and Order, 91 FCC 2d 59 (1982) (Second Report), recon., 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983), vacated, AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), rehearing en banc denied, January 21, 1993; Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 922 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984), recon., 59 Rad. Reg. 2d (P&F) 543 (1985); Sixth Report and Order, 99 FCC 2d 1020 (1985), rev'd, MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[72] AT&T v. FCC, 978 F.2d 7272 (D.C. Cir. 1992), rehearing en banc denied, January 21, 1993, cert. denied S. Ct. Docket # 92-1684, 1993 Lexis 4392, ___ U.S. __, 61 U.S.L.W. 3853 (June 21, 1993).

[73] Conference Report at 491.

applied to each carrier."[74]

54. We tentatively conclude that this section authorizes us to establish classes or categories of commercial mobile services and to promulgate regulations that vary among such classes. In addition, we tentatively conclude that this section authorizes us to establish regulatory requirements that differ for individual service providers within a class. We invite comment on these tentative conclusions.

55. We also seek comment on the service categories or classifications, if any, that we should establish for purposes of exercising our discretion under this section. We recognize that, in order to categorize commercial mobile services by type of service, the Commission must first resolve the issues discussed in an earlier section of this Notice regarding the definition of commercial mobile services and the services encompassed by the definition. Moreover, any final classification of commercial mobile services for purposes of exercising our authority under Section 332(c)(1)(A) will also be influenced by our conclusions relating to Sections 332(c)(1)(A)(i) through (iii), and Section 332(c)(1)(C). At this stage of our rulemaking, however, we nevertheless can tentatively conclude that the services that ultimately may be found to be commercial mobile services fall into three basic categories: certain common carrier mobile services; certain PCS services; and certain private mobile services. We invite comment on these categories and whether our regulation of the services in each should vary by category or within each category.

b. Commission forbearance authority and the public interest test

(i) Legislation

56. Under Section 332(c)(1)(A) the Commission may determine that the provisions of Title II of the Act need not be applied to some or all commercial mobile services providers except that the Commission may not forbear from applying Sections 201, 202, and 208. These latter sections require carriers to provide service upon reasonable request and upon reasonable terms (Section 201), forbid unjust or unreasonable discrimination (Section 202), and require the carrier to interconnect with other carriers upon order of the Commission (Section 201(a)). These obligations may be enforced by forfeitures (Sections 202(c) and 503(b)) or complaint (Section 208).

57. Section 332(c)(1)(A) permits the Commission to forbear from imposing a section of Title II upon some or all commercial mobile service providers only if the following determinations are made:

> (i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (ii) enforcement of such provision is not necessary for the protection of consumers; and
>
> (iii) specifying such provision is consistent with the public interest.

As part of evaluating the "public interest" described in Section 332(c)(1)(A)(iii), Section

---

[74] Id.

332(c)(1)(C) mandates that the Commission consider "whether the proposed regulation . . . will promote competitive market conditions, including the extent to which such regulation . . . will enhance competition among providers of commercial mobile services. . . ."

58. In the following paragraphs, we invite comment on several issues relevant to our decision to exercise the forbearance flexibility granted by Congress. For each Title II provision, the Commission must make the three-pronged determination required by Section 332(c)(1)(A). Therefore, the discussion reviews briefly the provisions of Title II and invites comment on the issues raised in making the Section 332(c)(1)(A) determination for particular statutory provisions.[75]

59. Pursuant to Section 332(c)(1)(C), the third prong of the statutory determination described by Section 332(c)(1)(A) must include consideration of whether forbearance would promote competitive market conditions, including competition among commercial mobile service providers. Commercial mobile service providers may provide three different kinds of telecommunications service for which they face competitors other than each other. Like local exchange carriers, mobile service providers may provide service that originates and terminates within a telephone exchange service area, as that term is used in Section 3(r) of the Communications Act. Our consideration of this prong thus may require an analysis of the impact of forbearance on competition in several areas. First, commercial mobile service providers may compete for end users with landline local exchange carriers. Second, such mobile service providers may also compete with landline local exchange carriers in the provision of access service to interexchange carriers.[76] Finally, commercial mobile service providers may provide interexchange service directly to end users in competition with traditional interexchange carriers like AT&T, MCI or Sprint. Therefore, commenters responding to the discussion of individual statutory provisions in the following paragraphs should address the impact of forbearance on the competitive conditions for each of these services.

(ii) Forbearance from regulation

60. The first two prongs of the test in Section 332(c)(1)(A) require the Commission, before it forbears, to determine that enforcement of the forborne section: (1) is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory; and (2) is not necessary for the protection of consumers. We request comment on the definition of "consumer." We also invite comment on what information the Commission should consider when performing these evaluations. We ask commenters to apply this test when evaluating whether forbearance is appropriate for any provision of Title II.

61. The third prong of the test in the legislation, reflecting the importance of market conditions in evaluating the public interest, is similar to the evaluation that the Commission has applied in the past where making a determination as to whether forbearance from tariff regulation is appropriate. In Competitive Carrier, the Commission found that market conditions

---

[75] The Conference Report also indicates that once the Commission has determined whether a rule should apply, it may revisit that determination if "after analyzing the market conditions for commercial mobile services, . . . application of such provision would promote competition and protect consumers." Conference Report at 491.

[76] See 47 C.F.R. Part 69.

were generally sufficient to ensure the lawfulness of rate levels and rate structures of carriers who lacked market power. Removing or reducing regulatory requirements also would tend to encourage market entry and lower costs. The Commission determined that if nondominant carriers attempted to charge unreasonable rates, in violation of Section 201(b) of the Act, or to discriminate unreasonably in violation of Section 202(a) of the Act, customers would simply move to other carriers.[77] The Commission concluded that marketplace forces could and would generally prevent unlawful behavior and, therefore, forbearance from mandatory tariff regulation for these nondominant carriers would not harm consumers and would otherwise serve the public interest.[78]

62. Our tentative view is that the level of competition in the commercial mobile services marketplace is sufficient to permit us to forbear from tariff regulation of the rates for commercial mobile services provided to end users.[79] In the PCS Notice, the Commission made some observations as to the types of services with which PCS will compete. The Commission commented that PCS providers "will be subject to substantial competition, both from other PCS services....and from the wide range of radio-based services currently offered: cellular services, specialized mobile radio services, paging services, wireless in-building services, cordless phones, and others."[80] The Commission tentatively concluded that regardless of whether PCS is determined to be a private or common carrier service, there will be no monopoly service provider, therefore reducing the need for government to protect customers from abuses stemming from market power.[81] As a result, the Commission tentatively concluded that PCS should be subject to minimal regulation.[82] As PCS will be in competition with the services identified above, we seek comment on whether the public interest, as identified above, will be served by forbearance from Sections 203, 204, 205, 211 (Filing of Contracts) and 214 of Title II for those PCS services that are ultimately deemed to be commercial mobile services. Of course, even with forbearance, complaints could be filed under Section 208.

63. In reviewing the status of competition in the cellular market, we look to comments that we have received in response to a petition for rulemaking filed by CTIA. In that petition, CTIA requested that the Commission identify its policy on the federal tariff obligations of cellular carriers.[83] We hereby incorporate by reference the comments filed in that proceeding. The record filed in response to the CTIA petition supports our tentative conclusion that commercial mobile services may be sufficiently competitive to permit us to forbear from regulating the rates for these services. This tentative conclusion is buttressed by the coming

---

[77] See Competitive Carrier Notice, 77 FCC 2d at 334-38; First Report, 85 FCC 2d at 31.

[78] Competitive Carrier Notice, 77 FCC 2d at 313-14, 358-59; First Report, 85 FCC 2d at 1-12; Second Report, 91 FCC 2d at 59-73.

[79] We do not, however, propose in this Notice to modify regulation of United States international services under Title II.

[80] PCS Notice, 7 FCC Rcd at 5712.

[81] Id.

[82] Id.

[83] See Cellular Telecommunications Industry Association (CTIA), Petition for Rulemaking, RM No. 8179, filed January 29, 1993.